Federal Communications Commission
Washington, D.C.

DOCKET FILE COPY ORIGINAL

March 6, 2000

Competition Policy Institute
c/o Debra Berlyn, Executive Director
1156 15th St. NW Suite 520
Washington, D.C. 20005

Re: Acceptance of Comments As Timely Filed in (CC Docket No. 00-4)

The Office of the Secretary has received your request for acceptance of your pleading in the above-referenced proceeding as timely filed due to operational problems with the Electronic Comment Filing System (ECFS). Pursuant to 47 C.F.R. Section 0.231(l), the Secretary has reviewed your request and verified your assertions. After considering arguments, the Secretary has determined that this pleading will be accepted as timely filed. If we can be of further assistance, please contact our office.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

CPI
Competition Policy Institute



February 23, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th St., N.W.
Washington, D.C. 20554

**Re: CC Docket 00-4, In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, (d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas**

Dear Ms. Salas:

The Competition Policy Institute, ("CPI") respectfully requests leave to file the attached Reply Comments of CPI in the above-referenced proceeding one business day out of time. On the official filing date, February 22, 2000, CPI experienced unforeseen difficulties uploading Comments to the Commission's Electronic Comment Filing System ("ECFS"), rendering it impossible to file and serve the Comments in accordance with the Commission's rules. According to the ECFS help desk, the web server for the ECFS system has been experiencing difficulties over the past several days apparently causing CPI's inability to file timely comments. Because CPI will file the complete set of Reply Comments less than one business day after the pleadings were due, CPI submits that no interested party will be prejudiced by the late filing. For the foregoing reasons, CPI respectfully requests that the Commission accept CPI's Reply Comments as timely.

Respectfully submitted,

Debra Berlyn

Debra Berlyn, Executive Director
Competition Policy Institute
1156 15th St. NW Suite 520
Washington, D.C. 20005

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C.**

| | |
|---|---|
| In the Matter of | ) |
| | ) |
| Application by SBC Communications Inc., | ) |
| Southwestern Bell Telephone Company, and ) | CC Docket 00-4 |
| Southwestern Bell Communications Services, | ) |
| Inc. d/b/a Southwestern Bell Long Distance | ) |
| for Provision of In-Region, InterLATA | ) |
| Services in Texas | ) |

Application by SBC Communications
For Authorization to Provide In-Region InterLATA Services
In Texas

# REPLY COMMENTS OF THE COMPETITION POLICY INSTITUTE

Ronald J. Binz, President
Debra R. Berlyn, Executive Director
Joshua M. Bobeck, Policy Counsel
1156 15th St. N.W. Suite 520
Washington, D.C. 20005
Phone: 202-835-0202
Fax: 202-835-1132

February 22, 2000

## I. INTRODUCTION AND SUMMARY

In its *New York Order*[1] the Commission was presented with an application that demonstrated a level of compliance with section 271 that permitted the Commission to approve Bell Atlantic's bid to provide in-region, interLATA services. In several important ways, the SBC Communications ("SBC" or "SWBT") application in Texas is inferior to the Bell Atlantic application in New York. The comments in this case demonstrate that SBC's level of compliance with the competitive checklist is lower than Bell Atlantic's, that the level of CLEC activity in Texas is probably less than in New York, that the methods used for OSS testing are inferior, and that the "backsliding" protections are likely to be less effective. The Competition Policy Institute (CPI) believes the Commission should not lower the bar to approve SBC's Texas application.[2]

The *New York Order* established numerous standards that Bell Operating Companies (BOCs) must meet to obtain section 271 approval. When the Commission applied these standards to Bell Atlantic's evidence, it found that the Company's performance was, in several respects, the minimum necessary to warrant long distance entry.[3] In these same areas SBC's performance falls short of the mark.

In these reply comments we first show that comments of the other parties demonstrate that SBC's performance is inferior to Bell Atlantic's minimally acceptable showing for hot cut loop

---

[1] *Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Services in the State of New York*, CC Docket No. 99-295, *Memorandum Opinion and Order*, FCC 99-404 (Dec. 22, 1999) ("*New York Order*").

[2] CPI is an independent, non-profit organization that advocates state and federal policies to promote competition in telecommunications and energy services in ways that benefit consumers. Complete information about CPI can be obtained from our web site at <www.cpi.org>.

[3] *See e.g., New York Order* ¶ 292-298 (standard for provisioning hot cut loops).

provisioning. SBC fails to provide evidence that its hot cut loop provisioning performance meets the *New York Order* standard for timeliness and service outages.

Next, the comments show that SBC's application does not establish that it provisions xDSL loops according to the Commission's standards. SBC's application does not show compliance with this requirement either through the use of an advanced services affiliate or by demonstrating that the company provisions loops in a nondiscriminatory fashion.

Third, SBC does not provide evidence sufficient for the Commission to conclude that its OSS is ready for commercial volumes. Telcordia's test was less thorough and comprehensive than KPMG's test of Bell Atlantic's OSS; the Commission cannot accord it the same weight in determining the ability of SBC's OSS to handle commercial volume.

Fourth, we note that SBC offers less evidence of competitive entry in Texas than Bell Atlantic offered in New York. SBC goes to great lengths to compare the competitive landscape in Texas with that in New York. Yet SBC's comparisons appear to be inaccurate. The relative competitiveness of New York and Texas is important because the Commission, in some instances, overlooked arguable deficiencies in Bell Atlantic's performance in New York because of the overall level of CLEC entry. The record in this proceeding leads us to conclude that the Commission cannot overlook similar deficiencies in SBC's performance.

Lastly, we demonstrate that SBC's performance remedy plan falls short of the standard the Commission requires for assurance that SBC will comply with the checklist following 271 approval. Many of the factors the Commission found assuring in New York's Performance Assurance Plan are missing from the plan adopted in Texas.

## II. SBC FAILS TO COMPLY WITH THE COMPETITIVE CHECKLIST

### A. SBC's Hot Cut Loop Performance Is Deficient

In the *New York Order*, the Commission determined that Bell Atlantic made a "minimally acceptable showing" that its hot cut loop provisioning complied with the checklist.[4] The Commission recognized that hot cut performance is critical "because of the substantial risk that an untimely or defective cutover will result in an end user customer's loss of service for more than a brief period, as well as the effect of such disruptions upon competitors."[5]

To obtain long distance entry in Texas, SBC must demonstrate to the Commission that its hot cut performance is as good as, or better than Bell Atlantic's "minimally acceptable" performance in New York. SBC fails to provide data necessary for the Commission to determine SBC's performance is nondiscriminatory; the useful data it does provide reveals discrimination.

In its application, SBC asserts that performance reporting shows that its hot cut performance complies with the checklist.[6] However, SBC also admits that its application provides incomplete data that is not necessarily representative of its actual hot cut performance.[7] To show that SBC is providing timely hot cuts, for example, SBC witness Dysart offers a sample of loop orders from only one of the two methods SBC employs for hot cuts.[8] The usefulness of these

---

[4] *Id.* ¶ 309.

[5] *Id.*

[6] *See* SBC brief p. 98.

[7] *See* SBC Brief at ¶ 98. *See also* SBC Dysart Aff. at ¶ 653-656.

[8] SBC Dysart Aff. at ¶ 653. We also note that SBC provides scant data concerning the Frame Due Time ("FDT") hot cut process. SBC provides no data on service outages, and only limited data on timeliness of FDT hot cuts. On the other hand, CLECs contend that SBC encourages the use of the FDT process and FDT hot cuts are done during the regular business day. AT&T DeYoung Decl. ¶ 59-60.

data are further limited because the data include only orders that "had both a start time and a stop time identified in SWBT's records."[9]

As DOJ points out, this sample data is not comparable to the data Bell Atlantic provided in New York.[10] In New York, the Commission determined that Bell Atlantic completed 90 percent of hot cut orders within the period established by the NYPSC.[11] In this case, SBC's reported data shows SBC meeting its timeliness standard between 85.6 percent and 86.3 percent of the time, according to DOJ.[12] SBC's evidence of timely hot cut performance, even if we assume the small sample is representative, shows SBC meeting its benchmark less often than the minimally acceptable 90% level permitted in the *New York Order*.

SBC also fails to show that its hot cut performance does not result in service outages to CLEC customers. The *New York Order* finds that measuring service outages is critical to gauging checklist compliance since "the ability of a BOC to provision working, trouble-free loops through hot cuts is of critical importance in view of the substantial risk that a defective cut will result in end-user customers experiencing service disruptions that continue for more than a brief period."[13] In the New York application, the Commission determined that Bell Atlantic's hot cuts caused service outages less than 5 percent of the time.[14] In contrast, SBC's service outage data for AT&T customers, after reconciliation with AT&T's data, shows that 8.2% of the hot cuts caused

---

[9] SBC Dysart Aff. ¶ 653. See also SBC Hot Cut *Ex Parte at* 1. (explaining use of sample in application due to "varying proficiency levels among technicians responsible for recording this information.")

[10] See DOJ Eval. p. 30.

[11] *New York Order* at ¶ 292-298

[12] DOJ Eval. p. 30-31.

[13] *New York Order* ¶ 299.

[14] *Id.* ¶ 309.

service outages. This evidence falls well short of the mark necessary to show checklist compliance, especially since this data does not include the data about Frame Due Time hot cuts or data from other CLECs.[15]

It is self-evident how damaging a failed hot cut will be to a carrier attempting to attract a customer away from an incumbent carrier. It is important that the Commission hold all BOCs to a standard no lower than the standard permitted in New York.

### B. SBC Does Not Demonstrate That it Provides Nondiscriminatory Access to xDSL-Ready Loops.

In the *New York Order,* the Commission advised future section 271 applicants that it expected "a separate and comprehensive evidentiary showing with respect to the provision of xDSL-capable loops, either through proof of a fully operational separate advanced services affiliate . . . or through a showing of nondiscrimination."[16] SBC asserts that its application satisfies the Commission's criteria using either avenue of proof.[17] The PUCT's evaluation supports SBC's assertion, concluding that SBC was meeting its obligation to provide nondiscriminatory access to xDSL loops.[18] As we will show to the contrary, SBC's application fails on both counts to meet its evidentiary burden for xDSL loops.

---

[15] See SBC brief p. 98 n. 50; SBC Dysart aff. ¶ 650-662 (ss CPI notes above, SBC offers no data on service outages as a result of the FDT hot cut process).

[16] *New York Order* ¶ 330.

[17] SBC Brief p. 39-40.

[18] PUCT Eval. p. 60.

### 1. SBC's Advanced Services Affiliate Is Not Fully Operational

In its application, SBC contends that its affiliate, SBC Advanced Solutions Inc. ("ASI"), is a "fully operational, structurally separate affiliate to provide advanced services in Texas and other states."[19] However, SBC also states that ASI was not providing SBC's advanced services until February 2, 2000 — more than three weeks after the 271 application was filed.[20] SBC further admits that ASI will not use the same UNEs and OSS that CLECs use until February 28, 2000.[21] Clearly, this affiliate fails to meet the "fully operational" requirement at the time of the 271 application, as required in the *New York Order*.[22]

SBC concedes that, although ASI is serving customers in Arkansas, it was not serving Texas customers when it filed the application.[23] Accordingly, SBC cannot show the Commission that its relationship with ASI is similar to its relationship with CLECs. Moreover, as DOJ observes, SBC offers no explanation how ASI's structure will cure SBC's inability to provide nondiscriminatory access to xDSL loops.[24] Since SBC does not show that its advanced services affiliate is fully operational, SBC must offer evidence of nondiscrimination in its commercial performance to satisfy the Commission's standard for xDSL loop provisioning.

---

[19] SBC Brief p. 43.

[20] SBC Brief p. 44.

[21] SBC Brief p. 44.

[22] See *New York Order* ¶ 330.

[23] SBC Brown Aff. ¶ 5.

[24] *See e.g.*, Arbitration Award, *Petition of Rhythms Links for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Dkt. No. 20226, *and Petition of DIECA Communications Inc., d/b/a Covad Communications Company for Arbitration of Interconnection Rates, Terms, Conditions and Arrangements with Southwestern Bell Telephone Company*, Dkt. No. 20272, at p. 48 (Tex P.U.C. November 30, 1999) ("*Arbitration Award*").

### 2. SBC's Performance Data Exposes Discrimination

In support of its contention that it provides CLECs nondiscriminatory access to xDSL-capable loops, SBC submits its "track record of commercial performance."[25] The PUCT agrees with SBC that its performance in this area complies with the checklist.[26] However, the PUCT also notes it "was concerned about the data results" and that SBC "was below parity for the months of September through November" for two critical measures of xDSL-provisioning performance.[27] Because of these shortcomings, the PUCT recently adopted certain "process modifications" that it believes will give CLECs parity performance.[28]

Both SBC and the PUCT rest their conclusion of future compliance with this checklist item on the hope that recent changes will improve SBC's deficient performance in a market they note is still nascent.[29] SBC emphasizes that CLECs did not begin requesting a substantial volume of xDSL loops until September 1999.[30] But we do not find this argument credible since it took SBC more than 20 months to negotiate and implement an interconnection agreement with Covad.[31] We also think this excuse glosses over SBC's poor record in negotiating interconnection agreements with CLECs seeking access to SBC's xDSL loops.[32]

---

[25] SBC brief p. 40.

[26] PUCT Eval. p. 63.

[27] PUCT Eval. p. 64-65.

[28] PUCT Eval. p. 64-65.

[29] *See* SBC brief p. 41-42; PUCT Eval. p. 64.

[30] SBC brief p. 40.

[31] Covad comments p. 62

[32] *See Arbitration Award*; see also Order No. 20, *Petition of Accelerated Connections Inc., d/b/a ACI Corp. for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, Dkt. No. 20226, *and Petition of DIECA Communications Inc., d/b/a Covad Communications Company for Arbitration*

For example, the PUCT did not establish most of the terms for SBC's xDSL loop provisioning until PUCT arbitrators had issued an award in a joint arbitration between Covad and Rhythms against SBC.[33] The PUCT upheld the arbitrators' award at an open meeting held January 27, 2000, but SBC has yet to implement its terms and suggests the company will appeal. It is at best disingenuous for SBC simultaneously to suggest that it will appeal the award yet point to *future* implementation of the practices required by the award as proof of checklist compliance.

Relying on such promises is contrary to Commission precedent which stresses that promises of future compliance have no probative value when considering a 271 application.[34] Even if the Commission were inclined to credit these promises, the record from the award arbitration suggests they may be largely empty promises.

The arbitration found against SBC on nearly every contested issue and concluded that SBC's practices with respect to provisioning xDSL loops were deficient.[35] For instance, the *Arbitration Award* concluded that SBC "impeded the availability of xDSL capable loops on a nondiscriminatory basis."[36] The arbitrators were also "troubled by the inconsistencies regarding the relationship between SWBT's retail and wholesale operations."[37] Based on this record, CPI urges the Commission not to accept SBC's promises that process revisions will improve SBC's xDSL loop performance. The company should be held to the reasonable standard previously

---

*of Interconnection Rates, Terms, Conditions and Arrangements with Southwestern Bell Telephone Company*, Dkt. No. 20272, at p. 48 (Tex P.U.C. July 27, 1999) ("*Sanctions Order*")

[33] *See Arbitration Award* at 48.

[34] *New York Order* ¶ 37.

[35] *See generally, Arbitration Award.*

[36] *Arbitration Award* p. 48.

[37] *Arbitration Award* p. 61.

articulated by the Commission: non-discriminatory provision of xDSL loops must be demonstrated as a prerequisite to approval of a section 271 application, not as a promise to be delivered upon afterwards.

SBC claims its current performance provides sufficient evidence to support a finding of checklist compliance notwithstanding the results of the *Arbitration Award*.[38] We agree instead with the DOJ that SBC's xDSL loop performance data "are seriously flawed," casting doubt on their evidentiary value, and in any event that the data suggest discrimination in favor of SBC's own retail DSL operation.[39]

A clear example of SBC's flawed data concerns measurement of the time within which SBC provides loop qualification information to a requesting CLEC. Pursuant to standards the PUCT established, SBC is supposed to measure the period beginning with its receipt of a CLEC loop qualification request and ending when SBC makes that information available to the CLEC.[40] As DOJ notes, SBC's data on this measure, submitted in support of this application, fails to accurately capture this period.[41] Furthermore, Covad questions whether SBC's data accurately records CLEC loop qualification requests, contending that only 71 percent of its loop qualification requests are reported in SBC's data.[42]

---

[38] *See* SBC brief at p. 40.

[39] DOJ Eval. p. 12.

[40] PM-57, Performance Measurements Business Rules, Appendix to Texas 271 Agreement, p. 71.

[41] DOJ Eval p. 13; See also DOJ Ex. 3: SBC DSL E-mail at 2.

[42] Covad comments p. 26.

In conclusion, SBC fails to provide proof of satisfactory xDSL loop provisioning that satisfies either the advanced services affiliate option or the Commission's nondiscrimination standard for checklist compliance.

### C. The Commission Should Not Give Telcordia's Third-party Test of SBC's OSS the Same Weight as KPMG's Test of Bell Atlantic's OSS in NY

In the *New York Order*, the Commission established that third party testing of an applicant's provision of nondiscriminatory access to OSS was important evidence that its OSS was handling current demand and could handle reasonably foreseeable volumes as demand increases.[43] The Commission explained that, absent actual commercial use, third party testing offers the most probative value for its determination whether the applicant's provision of OSS complies with the obligations imposed by section 271.[44]

The *New York Order* further explained what factors will govern the weight the Commission will give third party test results when considering future applications. KPMG's tests in New York persuaded the Commission that Bell Atlantic's OSS was ready for commercial volume due to five factors: 1) the scope and depth of KPMG's review; 2) KPMG's independence; 3) the military-style test philosophy used in testing; 4) the effort KPMG made to place itself in the position of a market entrant; and 5) efforts made to maintain blindness.[45]

The Commission did not say that all future third party OSS tests must adopt KPMG's methods. Rather, the Commission did not

---

[43] *New York Order* ¶ 89.

[44] *Id.* ¶ 100.

[45] *Id.*

> foreclose the possibility that a third-party test designed differently than the KPMG review may also be persuasive. Nonetheless, were a third party test less comprehensive, less independent, less blind, and, therefore, less useful in assessing the real world impact of a BOC's OSS on competing carriers, we would not necessarily find it persuasive and may accord it less weight than we do the KPMG Final Report. [46]

CPI strongly supports the emphasis the Commission places on the importance of rigorous third-party testing. We note that currently Bell Atlantic's OSS in New York is "causing wholesale orders to drop out of the normal OSS systems and substantially delaying the ability of consumers to move their services to competitive local exchange companies."[47] The New York experience shows that even KPMG's stringent testing was unable to prevent subsequent problems in Bell Atlantic's wholesale service to competitors. KPMG's test, which the Commission found persuasive evidence of OSS readiness, might not be the gold standard for third-party testing. Instead, the New York KPMG test establishes the minimum showing of commercial readiness the Commission should accept in a 271 application.

Obviously, if KPMG's test in New York establishes a minimum standard for third-party OSS testing, then Telcordia's test of SBC's OSS in Texas should meet or surpass that standard. SBC and the PUCT argue that conditions in Texas warranted a different approach than the one employed in New York.[48] CPI agrees that Texas could select a different approach. But the Commission should not accord less stringent tests the same weight it gave to KPMG's test.

We acknowledge the immense undertaking Telcordia faced, having only about half the time the NYPSC gave KPMG in New York. That fact, however, should not result in holding

---

[46] *Id.*

[47] *Order Directing Improvements to Wholesale Service Performance*, NYPSC Case 00-C-0008 and Case 00-C-0009, Feb. 11, 2000.("*NYPSC OSS Order*")

[48] PUCT Eval. p. 28, SBC Ham Aff. ¶ 251.

SBC's application to a less rigorous review. Consumers in Texas are just as deserving of assurances that, when they order local telephone service from a competitor to SBC, their order will be processed without undue delay and interruption of their telephone service.

Despite assurances from SBC and the PUCT, we are concerned that deficiencies in Telcordia's testing procedures render them less useful to this Commission's assessment of the real world impact of SBC's OSS on new entrants.

### 1. Pseudo-CLEC Approach

In New York

> KPMG combined efforts with Hewlett Packard to accomplish the transaction-driven tests. In doing so, KPMG acted much like a "pseudo-competing carrier" operations department, working with Bell Atlantic business rules, creating and tracking orders, monitoring Bell Atlantic performance, logging trouble tickets, and evaluating carrier-to-carrier bills. At the same time, Hewlett Packard acted as a competing carrier information technology department, establishing electronic bonding with Bell Atlantic, translating back and forth between business and EDI rule formats, and resolving problems with missing orders and responses."[49]

In contrast, the PUCT determined that the pseudo-CLEC model was not necessary in Texas because "CLEC interfaces used to pass orders to SWBT OSS were sufficiently developed to merit use of the third party monitored carrier-to-carrier test model."[50] Telcordia did not build interfaces with SBC, nor did it conduct actual transactions using interfaces. Instead, Telcordia observed CLECs such as AT&T, MCI, and others using interfaces that were already built.[51]

---

[49] *New York Order* ¶ 96.

[50] PUCT Eval. p. 28.

[51] AT&T Dalton and Connolly Aff. ¶ 58.

The third party pseudo-CLEC model employed in New York "exposed numerous problems with Bell Atlantic's documentation and operational procedures."[52] As the Commission observed, "by building and submitting transactions using Bell Atlantic's electronic interfaces with test accounts in central offices spread across New York, KPMG was able to experience first hand the life of a competing carrier."[53] In New York, it turned out to be particularly important that the testing party built its OSS interface from Bell Atlantic's existing documentation.

In contrast, AT&T asserts that in Texas it was "able to develop its EDI interface only after an extensive period of trial and error and extensive discussions with SWBT, due to SWBT's failure to provide adequate documentation."[54] It obviously does new entrants little good to know that AT&T and MCI WorldCom have OSS interfaces running when they must rely on SBC's documentation to construct their own. This process lengthens the time it takes new entrants to enter the market and efficiently offer service to customers, since each new entrant must undergo a similar trial and error process.

### 2. Military-Style Testing

In evaluating the thoroughness of KPMG's test of Bell Atlantic's OSS, the Commission recognized the importance of employing a military-style test philosophy.[55] SBC claims that Telcordia's test used the same approach in conducting the test of SBC's OSS in Texas.[56] But the comments of other parties casts doubt on this assertion.

---

[52] Allegiance comments p. 10.

[53] *New York Order* ¶ 96.

[54] AT&T Dalton and Connolly Aff. ¶ 60.

[55] *New York Order* ¶ 100.

[56] SBC Ham Aff. ¶ 254.

ALTS contends that Telcordia closed test issues although it was unable to assure the PUCT and CLECs that the issue would not arise again.[57] AT&T cites a case in which Telcordia reported that SBC mistakenly disconnected an AT&T customer account due to manual error; yet Telcordia "closed" the problem without recommending a solution to prevent future occurrences of the same problem.[58]

Although this is only one example, it is plainly inconsistent with military-style testing philosophy and undermines claims of the third-party OSS testing. Without assurance from the tester that it has identified and repaired the causes of SBC's errors, there can be no confidence that the problem will not recur. Without such confidence, the Commission cannot reasonably conclude that SBC's OSS are operationally ready for commercial volume.

## III. SBC'S APPLICATION IS NOT CONSISTENT WITH THE PUBLIC INTEREST

### A. The Level of Competition in Texas Is Lower than the Level of Competition in New York.

CPI agrees with the Department of Justice that the experience of competitive entrants is "highly probative evidence of whether barriers to competition remain" in the Texas market.[59] Our formulation is a bit less rigorous: the proof of the pudding is in the eating. We also assume that SBC recognizes the importance of this aspect of the application since the Company went to great lengths in its filing to estimate access line numbers for its competitors. Unfortunately, the Company seems to have substantially overstated its estimates of market share obtained by new entrants.

---

[57] ALTS p. 7.

[58] *See* AT&T Dalton and Connolly Aff. ¶ 96.

[59] DOJ Eval. at p. 7-8.

In the *New York Order* the Commission held that the 1996 Act, since it does not contain an explicit market share test, did not allow it to consider market share or similar arguments unless parties directly linked such evidence to the applicant's relationship with competitors.[60] The Commission also emphasized that it will base 271 approval on whether the "applicant has opened the doors for local entry through full checklist compliance, not on whether competing LECs actually take advantage of the opportunity to enter the market."[61]

Nonetheless, the Commission interpreted the significant CLEC presence in New York as an indication that minor checklist compliance problems were not inhibiting CLEC entry.[62] Relying on these market facts, the Commission discounted CLEC complaints because the extensive CLEC presence in New York showed that the problems were surmountable. Thus, minor checklist compliance issues did not overwhelm Bell Atlantic's overall showing of compliance.[63]

The Commission should not employ a similar approach for SBC's application. The level of local telephone competition in Texas is apparently not as substantial as in New York when Bell Atlantic filed its application, making such an approach unwarranted.

In its efforts to favorably compare its market-opening efforts with Bell Atlantic's effort in New York, SBC apparently took liberties calculating the level of competitive entry it faces. Many CLECs contend that SBC's application grossly overstates the number of facilities-based access lines they have in service. Allegiance, for instance, asserts that it "serves fewer than half as many

---

[60] *New York Order* at ¶427.

[61] *New York Order,* at ¶427.

[62] *New York Order* at ¶ 426-427.

[63] *See New York Order* ¶ 426-427.

lines as SWBT claims."[64] This wide difference is very troubling, especially since SBC's application identifies Allegiance as the CLEC with the most facilities-based lines in Texas. Other competing carriers dispute SBC's access line count. AT&T contends CLECs serve 552,000 facilities based access lines.[65] Sprint estimates CLECs serve approximately 500,000 access lines using all three modes of entry in Texas.[66] CPI also notes that the instant application is not the first time CLECs have disputed SBC's access line estimates.[67] CLECs uniformly dispute SBC's convoluted methodology for calculating facilities-based access lines.[68] Although the Public Utility Commission of Texas ("PUCT") found SBC's methodology reasonable, it still concludes that it has "no way of determining whether the CLECs numbers are more accurate or whether SWBT's numbers are more accurate."[69]

The DOJ also discounts SBC's competitor access line count, estimating instead that CLECs in Texas have between 350,000 and 400,000 full facilities-based access lines in service.[70] This estimate does not compare favorably with the situation in New York. Bell Atlantic's estimate in its New York filing, accepted by the Commission, showed that CLECs served at least 651,793 facilities-based lines.[71] Dividing by the number of retail lines in service in the respective

---

[64] Allegiance comments at p. 13.

[65] AT&T Kelley/Turner Decl. ¶ 47.

[66] Sprint comments at p. 7.

[67] *See* Sprint comments p. 76.

[68] *See* Allegiance comments at 13; Sprint comments p. 75-76, MCI WorldCom comments p. 59. *See also* DOJ Eval. p. 9 n. 15.

[69] PUCT Eval. at p. 100-102.

[70] DOJ Eval at p. 9.

[71] *New York Order* ¶ 14.

states, this means that CLEC facilities-based service had captured about 5.3% of the retail lines in New York but only 3.51%-3.99% in Texas.[72]

## B. SBC's Performance Remedy Plan Is An Inadequate Guard Against Backsliding.

In the *New York Order,* the Commission reaffirmed its commitment to seek assurances that applicants would continue to comply with the competitive checklist after obtaining long distance entry.[73] In clarifying how it will evaluate such assurances, the Commission stated that it does not expect state-sponsored performance plans to provide complete protection against backsliding.[74] However, when an applicant offers such evidence, the Commission will "review the mechanisms involved to ensure they are likely to perform as promised."[75]

In the *New York Order*, the Commission found that the Performance Assurance Plan (PAP) fell into "a zone of reasonableness" and "was likely to provide incentives sufficient to foster post entry checklist compliance."[76] There are several significant distinctions between the PAP in NY and the Performance Remedy Plan (PRP) in Texas, that we think causes the Texas PRP to fall outside of the Commission's zone of reasonableness.

First, the structure of the PRP does not provide SBC with meaningful incentives to comply with the performance standards. Specifically, the per-occurrence approach for assessing

---

[72]The data required for these calculations are found at: *New York Order*, ¶ 14; DOJ Eval at p. 9; DOJ Exhibit 1, Attachment; and DOJ Evaluation of Bell Atlantic's Application in CC Docket No. 99-295 at p. 9.

[73] *New York Order* ¶ 429.

[74] *Id.* ¶ 430.¶

[75] *Id.* ¶ 433.

[76] *Id.*

penalties and the three month grace period for Tier 2 penalties detract from the PRP's effectiveness and contrast with the measures adopted in New York.

The per-occurrence approach for calculating penalties is seen to be inappropriate when we consider that it will apply to emerging services provided by new entrants. By definition, the per-occurrence approach means that sanctions will be limited because volumes are small. This leaves SBC with incentives to thwart competition for such services since the benefits of such conduct far outpace the costs. This effect is in contrast with the New York PAP that allocates penalties on a per-measure basis.

Simply put, the incentives are backwards. SBC may have greater incentive to discriminate against emerging competition that needs *more* protection from discrimination, not less. SBC could thwart emerging competition in advanced services, expand its dominance into that market, and incur only minimal financial penalties as a result. This is not a characteristic of a plan reasonably designed to assure future compliance with section 271.

Second, the PRP affords SBC ample opportunity to litigate and delay implementation of any fines that may be assessed. The *New York Order* stressed the importance of remedies in performance plans being self-executing. Inherent in the concept of a self-executing remedy is that the remedy limit the BOC's ability to appeal, with permitted delays limited to narrowly defined circumstances.[77] The *New York Order* found the New York PAP largely consistent with that principle except for a clause that allows Bell Atlantic to avoid paying fines if caused by "CLEC's inappropriate behavior."[78] The Commission was concerned that this waiver clause was vague but

[77] *Id.* ¶ 441.

[78] *Id.* ¶ 441 n. 1355.

was reassured by a NYPSC order suggesting such provisions would apply only in "extraordinary circumstances."[79]

Under the Texas PRP, SBC may appeal assessed penalties when they are due to "third-party error."[80] In addition, SBC may also appeal payments if due to CLEC "bad faith".[81] Both of these clauses in the Texas PRP are substantially similar to the "inappropriate behavior" clause in the New York PAP. Both of these clauses are "vague" and "could be used to challenge a very wide range of data."[82] Except that, in New York the NYPSC has provided assurance that such clauses will be narrowly applied. No such assurance exists in the performance plan in Texas. For these reasons, the Commission should not rely on the PRP to provide an effective deterrent against SBC backsliding.

## IV. CONCLUSION

SBC's performance in Texas fails to come up to the standards for section 271 compliance that the Commission established in the *New York Order*. SBC fails to show it complies with the checklist in providing hot cut loops and DSL ready loops and also fails to demonstrate that the third-party testing of its OSS proves it can handle current and future demand. SBC's application is not consistent with the public interest. The level of CLEC activity in Texas is less than the level of CLEC entry in New York, indicating that the market is not fully open to competition. Further,

---

[79] *Id.*

[80] T2A Att. 17, p.7 cl 7.1

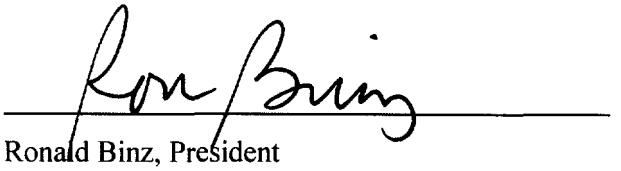
[81] *Id.* p. 7 cl. 7.2.

[82] *See New York Order* ¶ 441 n. 1355.

SBC fails to show that its Performance Remedy Plan will be as effective as the plan Bell Atlantic offered in support of its successful 271 application.

The Commission should not lower the bar in order to approve SBC's section 271 application. Instead, the Commission should deny this application.

Respectfully submitted,



Ronald Binz, President
Debra Berlyn, Executive Director
Joshua M. Bobeck, Policy Counsel

Competition Policy Institute
1156 15th St. NW Suite 520
Washington, D.C. 20005

February 22, 2000

**Certificate of Service**

I, Christina M Devlin, hereby certify that on this 22nd day of February, 2000 copies of the foregoing Reply Comments of the Competition Policy Institute were served by electronic filing or by first-class, United States mail, postage prepaid, upon each of the parties listed below.

Signed: Christina M Devlin

Magalie Roman Salas, Secretary
Federal Communications Commission
Room TW-B-204
445 12th St., SW
Washington, DC 20554

Jerome L. Epstein
Nory Miller
Paul W. Cobb, Jr.
Marc A. Goldman
Jeffrey L. Ryen
Jenner & Block
601 13th St NW, Suite 1200
Washington, DC 20005
Counsel for MCI WorldCom

Anthony C. Epstein
Steptoe & Johnson
1330 Connecticut Avenue, NW
Washington, DC 20036
Counsel for MCI WorldCom

Mary L. Brown
Keith L. Seat
Henry G. Hultquist
MCI WorldCom, Inc.
1801 Pennsylvania Avenue NW
Washington, DC 20006

Robert W. McCausland
Vice President, Regulatory and
Interconnection
Allegiance Telecom, Inc.
1950 Stemmons Freeway, Suite 3026
Dallas, TX 75207-3118
Counsel for Allegiance Telecom

Russell M. Blau
Michael C. Sloan
Swidler, Berlin Shereff Friedman, LLP
3000 K Street NW, Suite 300
Washington, DC20007-5116

The Honorable Pat Wood III, Chairman
Public Utility Commission of Texas
1701 N. Congress Avenue
Austin, TX 78711

The Honorable Judy Walsh, Commissioner
Public Utility Commission of Texas
1701 N. Congress Avenue
Austin,TX 78711

The Honorable Brett Perlman,
Commissioner
Public Utility Commission of Texas
1701 N. Congress Avenue
Austin, TX 78711

Robin A. Casey
Eric H. Drummond
Susan C. Gentz
Casey, Gentz & Sifuentes, LLP
919 Congress Avenue Suite 1060
Austin, TX 78701
Counsel for the CLEC Coalition

James D. Ellis
Paul M. Mancini
Martin E. Grambow
Kelly M. Murray
Counsel for SBC Communications, Inc.
175 E. Houston
San Antonio, TX 78205

Alfred G. Richter, Jr.
Counsel for Southwestern Bell
Telephone Company
175 E. Houston Room #1250
San Antonio, TX 78205

Anne E. Meuleman
Counsel for Southwestern Bell
Telephone Company
1616 Guadalupe Street Room 600
Austin, TX 78701-1298

Michael K. Kellogg
Austin C. Schlick
Kellogg, Huber, Hansen, Todd
& Evans, PLLC
1301 K Street NW, Suite 1000 West
Washington, DC 20005
Counsel for SBC Communications, Inc.,
Southwestern Bell Telephone Company, and
Southwestern Bell Communications
Services, Inc.

Jonathan Askin
General Counsel
ALTS
888 17th St NW
Washington, DC 20006

Robin A. Casey
Eric H. Drummond
Susan C. Gentz
Casey, Gentz & Sifuentes, LLP
919 Congress Avenue Suite 1060
Austin, TX 78701
Counsel for ALTS

Wilkie Farr & Gallagher
Three Lafayette Center
1155 21st Street NW
Washington, DC 20036
Counsel for Sprint Communications
Company LP
Thomas M. Koutsky
Vice President, Federal Regulatory Affairs
Covad Communications Company
600 14th Street NW, Suite 750
Washington, DC 20005

Christopher Goodpastor
Regional Counsel
Covad Communications Company
9600 Great Hills Trail Suite 150 W
Austin, TX 78759

Mark C. Rosenblum
Roy E. Hoffinger
Dina Mack
AT&T Corporation
295 North Maple Avenue
Basking Ridge, NJ 07920

Mark Witcher
Michelle Bourianoff
AT&T Corporation
919 Congress Avenue, Suite 900
Austin, TX
78701-2444

James L. Casserly
James J. Valentino
Uzoma C. Onyeije
Paula Deza
Casey Anderson
Mintz, Levin, Cohn, Ferris, Glovsky &
Popeo, PC
701 Pennsylvania Avenue, NW
Washington, DC 20004-2608
Counsel for AT&T Corporation

John A. Redmon
David F. Wertheimer
Davis Weber & Edwards PC
100 Park Avenue
New York, NY 10017
Counsel for AT&T Corporation

Donald J. Russell

Frances Marshall
Katherine E. Brown
Luin Fitch
Matthew C. Hammond
Brent E. Marshall
Anu Seam
Telecommunications Task Force, Antitrust Division
US Dept of Justice
1401 H Street NW, Suite 8000
Washington, DC 20530

Joel I. Klein
A. Douglas Melamed
Marius Schwartz
W. Robert Majure
Matthew Magura
Antitrust Division
US Dept of Justice
1401 H Street NW, Suite 8000
Washington, DC 20530